SEK YUEN HWA & ORS.

v.

SYN TAI HUNG SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 12-22-89]
4 JUNE 1990

CIVIL PROCEDURE: *Appeal - Extension of time - Setting aside default judgment - Notes on evidence and grounds of judgment - Discretion of Court - Preliminary appeal.*

The plaintiff/respondent had, on 27 May 1988, obtained default judgment under O. 26 of the Subordinate Court Rules 1980. The defendant's former solicitors application to set aside the default judgment was dismissed. The defendants/appellant again applied on 27 April 1989 (through their present solicitors) to the Sessions Court for extension of time to file an application to set aside the default judgment; this too was dismissed. This is an appeal against that dismissal.

Held:

[1] The first application which was dismissed was not appealed against; strictly speaking the second application for extension of time to file the appeal must be dismissed *in limine.*

[2] The defendant's contention that the notes of evidence and grounds of judgment were missing and that the documents were not clear, does not constitute a sufficient ground for granting extension of time. Counsel could have settled the memorandum of appeal after perusing these documents and could have filed a preliminary memorandum of appeal.

[3] There was no material upon which the Court could exercise its discretion to grant an extension of time. The mistake of the defendant's solicitors in the circumstances of the case did not constitute a ground for granting extension of time.

[Defendant's appeal dismissed with costs.]

Cases referred to:
Ratnam v. Cumarasamy & Anor. [1965] 1 MLJ 228
Gan Hay Chong v. Siow Kian Yuh & Anor. [1975] 2 MLJ 129

Legislation referred to:
Subordinate Courts Rules 1980, O. 26, O. 49 r. 3(3)

For the appellant - Y.K. Leong; M/s. Riza Leong & Partners
For the respondent - L.C. Tan; M/s. Khoo Kheng Choon & Co.

JUDGMENT

Edgar Joseph Jr J:

This was a defendant's application for extension of time to file and serve the memorandum of appeal.

The history of the matter which called for the consideration of the Court may be stated shortly.

Upon an application for summary judgment under O. 26 of the Subordinate Court Rules 1980, arising out of an action for the price of goods sold and delivered, the plaintiff had obtained default judgment, although a defence denying the claim, further alleging that the claim was

misconceived, and in the alternative that the goods were defective, had been filed. This was on 27 May 1988, when Counsel for the defendant was apparently engaged in a criminal matter in the Sessions Court at Kuala Lumpur though he had applied by letter for an adjournment which evidently had been refused by the learned President.

The defendants' solicitors (who incidentally are not his present solicitors) then applied to set aside the default judgment but the application was dismiss with costs on 23 February 1989.

It would appear that the defendants again applied to the Sessions Court for extension of time to file an application to set aside the default judgment entered on 27 May 1988, though why they did so is a little hard to understand. Be that as it may, this application too was dismissed on 27 April 1989. It is from this decision that the defendants had appealed to this Court. They did so by filing and serving notice of appeal dated 3 May 1989.

By a letter dated 18 July 1989, the Registrar of the Sessions Court wrote to the defendants' present solicitors enclosing 6 copies of notes of evidence and grounds of judgment and also reminding them that sufficient copies of the appeal record had to be filed within 6 weeks from the date of receipt thereof which was on 16 August 1989.

At this point, according to the affidavit of Encik Ahmad Riza bin Basir, Counsel having charge of the conduct of the appeal on behalf of the defendants, affirmed to on 5 October 1989 (annexed to encl. 4), upon perusing his file for purposes of settling the memorandum of appeal and the appeal record, he had found that some of the cause papers (unspecified) were missing, some of the documents were not clear and a few of the cause papers were not even dated. Encik Ahmad Riza added that the cause papers and other relevant documents had been prepared by the defendants' former solicitors. He immediately then contacted his clients, the defendants, but was unable to obtain any of the said documents.

On 23 September 1989, the defendants' solicitors communicated on the telephone with the defendants' former solicitors requesting that they apply to the Registrar Sessions Court for the necessary documents, which apparently they did because on 3 October 1989, the defendants' solicitors did receive the same. By this time, of course, the time limited by O. 49 r. 3 sub-rule (3) for filing the memorandum of appeal had expired; the last day for this being 27 September 1989.

It was said on behalf of the defendants that they had "a very good chance of succeeding" in the appeal because they did not order or receive the goods, the subject of the sale which gave rise to the suit.

Now, as already noted, it was freely admitted on behalf of the defendants that the grounds of judgment and notes of evidence had been received from the Registrar of the Sessions Court on 16 August 1989.

It will also be recalled that the decision of the learned President dismissing the defendants' first application to set aside the default judgment was given on 23 February 1989, yet no notice of appeal appears to have been even lodged or filed against the same. Instead, for reasons not vouchsafed to this Court, a second application to set aside the default judgment was filed and this was, heard and dismissed on 27 April 1989; it was against this decision that notice of appeal had been filed. Strictly, therefore, there being not even a notice of appeal filed against the decision of the learned President given on 23 February 1989, the present application for extension of time to file the memorandum of appeal must, on this ground alone, be dismissed *in limine.*

But, on a further ground also, the present application was bound to fail.

It was also freely admitted on behalf of the defendants that their solicitors had on 16 August 1989 duly received the grounds of judgment and the notes of evidence accompanied by the letter of the Registrar Sessions Court dated 18 July 1989 reminding them of the time limited under O. 49 r. 3(3) for the filing of the memorandum of appeal. There is no suggestion that either the grounds of judgment or the notes of evidence were illegible. All that was said was - and this too without particularisation - that some of the cause papers were missing, some of the documents were not clear and a few of the cause papers were not even dated.

In my view, even if true, this does not constitute a sufficient ground for granting extension of time. In the majority of cases for purposes of settling the memorandum of appeal, the essential parts of the record would be the grounds of judgment, the notes of evidence and the pleadings. There had been no suggestion that any of these was illegible. I can think of no valid reason - and indeed none had been vouchsafed to this Court - why Counsel could not settle the memorandum of appeal after perusing these essential parts of the record. At least, Counsel could have filed a preliminary memorandum of appeal to be followed up, if necessary, by a supplementary memorandum of appeal after receipt of clearer copies of the documents complained about.

Accordingly, there was no material upon which I could exercise my discretion in favour of defendants.

The following passage in the judgment of the Privy Council in *Ratnam v. Cumarasamy & Anor*. [1965] 1 MLJ 228 at p. 229 is noteworthy:

> The rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation.

I find, just as the Federal Court did in *Gan Hay Chong v. Siow Kian & Anor*. [1975] 2 MLJ 129, that the mistake of the defendant's solicitors, in the circumstances of this case, did not constitute a ground for granting extension of time.

In the result, the application was dismissed with costs.

Also found at [1990] 2 CLJ 294